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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MATTHEW CARL BERRY,
Movant,

v.

UNITED STATES OF
AMERICA,

Respondent.

Case Nos. **EDCV 13-01747-VAP**
EDCR 06-00075-SGL

**ORDER DENYING MOTION FOR
RELIEF UNDER 28 U.S.C. §
2255**

**[Motion filed on September
25, 2013]**

I. SUMMARY OF PROCEEDINGS

On September 25, 2013, Matthew Carl Berry ("Movant") filed a "Motion Under U.S.C. § 2255 To Vacate, Set Aside Or Correct A Sentence By A Person In Federal Custody." ("Motion" or "Mot.") ([Civ.] Doc. No. 1.)¹ Respondent filed an Opposition to the Motion on December 6, 2013. ([Civ.] Doc. No. 9.) On January 9, 2014, Movant filed a Reply. ([Civ.] Doc. No. 12.)

¹ Citations to "[Civ.]" refer to the Court's docket for the Motion in the civil case EDCV 13-01747-VAP. Citations to "[Crim.]" refer to the Court's docket in the underlying criminal case, EDCR 06-00075-SGL.

II. BACKGROUND FACTS

After a jury trial, Movant was found guilty of one count of conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, and three counts of willfully filing false tax returns, in violation of 26 U.S.C. § 7206(1). ([Crim.] Doc. Nos. 252 (April 17, 2008 Jury Trial Minutes); 256 (Jury Verdict Form).) Movant was sentenced to 60 months imprisonment on the conspiracy count and 16 months of imprisonment for each count of willfully filing a false tax return, for a total of 108 months, to be served consecutively. ([Crim.] Doc. No. 366 (Second Amended Judgment).)

Movant filed a Notice of Appeal on June 28, 2009. ([Crim.] Doc. No. 359.) On December 5, 2011, the Ninth Circuit Court of Appeals affirmed Movant's conviction. ([Crim.] Doc. No. 489; United States v. Berry, 460 F. App'x 684 (9th Cir. 2011).) The Supreme Court denied Movant's petition for writ of certiorari on October 1, 2012. (See Berry v. United States, 2012 WL 1945723 (U.S. Oct. 1, 2012).)

III. DISCUSSION

Section 2255 authorizes the Court to "vacate, set aside or correct" a sentence of a federal prisoner that "was imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255(a). Claims for

1 relief under § 2255 must be based on some constitutional
2 error, jurisdictional defect, or an error resulting in a
3 "complete miscarriage of justice" or in a proceeding
4 "inconsistent with the rudimentary demands of fair
5 procedure." United States v. Timmreck, 441 U.S. 780,
6 783-84 (1979). If the record clearly indicates that a
7 movant does not have a claim or that he has asserted "no
8 more than conclusory allegations, unsupported by facts
9 and refuted by the record," a district court may deny a §
10 2255 motion without an evidentiary hearing. United States
11 v. Quan, 789 F.2d 711, 715 (9th Cir. 1986); see also
12 United States v. Chacon-Palomares, 208 F.3d 1157, 1159
13 (9th Cir. 2000) ("When a prisoner files a § 2255 motion,
14 the district court must grant an evidentiary hearing
15 '[u]nless the motion and the files and records of the
16 case conclusively show that the prisoner is entitled to
17 no relief.'" (quoting 28 U.S.C. § 2255)).

19 **A. Grounds for Relief**

20 Movant raises two grounds for relief:

21 1. Movant's sentence for conspiracy to defraud the
22 United States and for willfully filing a false tax return
23 are based on the same conduct, and therefore, to the
24 extent his sentences on those counts were imposed
25 consecutively, they violated the Double Jeopardy Clause
26 of the Fifth Amendment (Mot. P & A at 12-15);

1 2. Movant's trial counsel and appellate counsel
2 rendered ineffective assistance of counsel by failing to
3 object on double jeopardy grounds to the imposition of
4 consecutive sentences against him. This ineffective
5 assistance of counsel should excuse him from procedural
6 default on his first ground for relief (Id. at 8-12).

7
8 **B. Procedural Default**

9 Generally, claims not raised on direct appeal may not
10 be raised in a motion pursuant to § 2255 unless the
11 petitioner shows cause and prejudice, "actual innocence,"
12 or if the claim is related to an ineffective assistance
13 of counsel claim. Massaro v. United States, 538 U.S.
14 500, 504-05 (2003) ("We hold that an ineffective-
15 assistance-of-counsel claim may be brought in a
16 collateral proceeding under § 2255, whether or not the
17 petitioner could have raised the claim on direct
18 appeal."); see also Bousley v. United States, 523 U.S.
19 614, 621-622 (1998). As Movant alleges that he was
20 deprived of effective assistance of counsel when his
21 trial and appellate counsel failed to raise the double
22 jeopardy argument, Movant's procedural default is
23 excused.

1 **C. Movant's Double Jeopardy Claim Is Without Merit**

2 Movant argues that his sentence for conspiracy to
3 defraud the United States and for willfully filing a
4 false tax return are based on the same conduct, and
5 therefore violate the Double Jeopardy Clause of the Fifth
6 Amendment, as stated in Blockburger v. United States, 284
7 U.S. 299 (1932). (Mot. P & A at 12-15.)

8
9 The Fifth Amendment, among other things, protects
10 "against multiple punishments for the same offense."
11 North Carolina v. Pearce, 395 U.S. 711, 717 (1969)
12 overruled on other grounds by Alabama v. Smith, 490 U.S.
13 794 (1989). In Blockburger, the Supreme Court held that
14 "where the same act or transaction constitutes a
15 violation of two distinct statutory provisions, the test
16 to be applied to determine whether there are two offenses
17 or only one, is whether each provision requires proof of
18 a fact which the other does not." Blockburger, 284 U.S.
19 at 304. The typical case is one in which two different
20 statutes define the "same offense" because one is a
21 lesser included offense of the other. Rutledge v. United
22 States, 517 U.S. 292, 297 (1996); see Missouri v. Hunter,
23 459 U.S. 359, 366-67 (1983).

24
25 If the two offenses are determined not to be the
26 same, the district court may impose consecutive
27 sentences. See 18 U.S.C. § 3584 ("If multiple terms of
28

1 imprisonment are imposed on a defendant at the same time
2 . . . the terms may run concurrently or consecutively
3").

4
5 Movant's argument that the sentencing for his
6 convictions runs afoul of Blockburger because "the
7 offense described in 18 U.S.C. § 371 also cover the
8 offenses described in 26 U.S.C. § 7206(1)," lacks merit.

9
10 Movant was convicted and sentenced on one conspiracy
11 count and three substantive counts. Here, in order to
12 convict Movant of violating 26 U.S.C. § 7206(1),
13 willfully filing a false tax return, the Government had
14 to prove the following beyond a reasonable doubt:

15 (1) the defendant made and subscribed a return,
16 statement, or other document that was incorrect
17 as to a material matter; (2) the return,
18 statement, or other document subscribed by the
19 defendant contained a written declaration that
20 it was made under the penalties of perjury; (3)
21 the defendant did not believe the return,
22 statement, or other document to be true and
23 correct as to every material matter; and (4) the
24 defendant falsely subscribed to the return,
25 statement, or other document willfully, with the
26 specific intent to violate the law.

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1 United States v. Scholl, 166 F.3d 964, 979-80 (9th Cir.
2 1999)(citing United States v. Marabelles, 724 F.2d 1374,
3 1380 (9th Cir. 1984)).

4
5 With respect to 18 U.S.C. § 371, conspiracy to
6 defraud the United States, the Government had to prove
7 the following beyond a reasonable doubt: (1) defendant
8 entered into an agreement; (2) to obstruct a lawful
9 function of a government; (3) by deceitful or dishonest
10 means; and (4) made at least one overt act in furtherance
11 of the conspiracy. See United States v. Caldwell, 989
12 F.2d 1056, 1058 (9th Cir. 1993) (citing Hammerschmidt v.
13 United States, 265 U.S. 182, 188 (1924)). Section 371
14 "reaches any conspiracy for the purpose of impairing,
15 obstructing or defeating the lawful function of any
16 government agency [and] clearly applies to conspiracies
17 to impede, impair, obstruct, or defeat the lawful
18 function of the Department of Treasury in the collection
19 of income taxes." United States v. Little, 753 F.2d
20 1420, 1443 (9th Cir. 1984) (internal citations omitted).

21
22 It is well-settled that a sentence for conspiracy
23 does not preclude a sentence on underlying substantive
24 counts on Fifth Amendment grounds. As the Ninth Circuit
25 explained

26 As a general rule, a substantive charge, and
27 conspiracy charge based on the substantive
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1 charge, pass muster under the Blockburger test
2 and retain their separateness. The reason for
3 this is because a requirement for a conspiracy
4 conviction is proof of an agreement which is not
5 necessary to prove an underlying substantive
6 count. And, conviction on the substantive count
7 will require the consummation of the crime,
8 which, of course, is not essential for
9 completing the crime of conspiracy.

10 United States v. Wylie, 625 F.2d 1371, 1381 (9th Cir.
11 1980) (emphasis added)(internal citations omitted).
12

13 As explained in Wylie, the elements of 26 U.S.C.
14 § 7206(1) and 18 U.S.C. § 371 are not the same, and each
15 prohibits different conduct. The conspiracy count
16 includes an element that there be an agreement between
17 two or more people to defraud the United States, whereas
18 the tax fraud counts do not require an agreement and
19 could, in theory, be accomplished by a single person
20 acting alone. For these reasons, Movant's sentence does
21 not run afoul of Blockburger, and the Court was free to
22 sentence him consecutively for each count upon which he
23 was convicted. See United States v. Davis, 793 F.2d 246,
24 249 (10th Cir. 1986) ("The elements required to prove
25 commission of the three crimes [including 26 U.S.C.
26 § 7206(1) and 18 U.S.C. § 371] are distinct under
27 Blockburger; accordingly the consecutive sentences
28

1 imposed pursuant to each statutory provision do not
2 violate the Double Jeopardy Clause.")²; United States v.
3 Kritt, 2009 WL 6567103, at *10 (S.D.W. Va. Nov. 19, 2009)
4 report and recommendation adopted, 2010 WL 2331061
5 (S.D.W. Va. June 8, 2010) ("The allegations [in the
6 indictment] are intended to charge one of several
7 affirmative acts constituting the attempted evasion of
8 income tax, a separate offense requiring the proof of one
9 or more facts which the charge of conspiracy to defraud
10 the United States does not. The undersigned finds no
11 multiplicity.").

12
13 Accordingly, Movant is not entitled to relief on this
14 ground.

15
16 **D. Movant's Ineffective Assistance of Counsel Claim Must**
17 **Fail**

18 Movant argues that his trial and appellate counsel
19 rendered ineffective assistance of counsel by failing to
20 object to or seek review of the imposition of the
21 consecutive sentences against him. (Mot. P & A at 8-12.)
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26 ² The Tenth Circuit also rejected the argument
27 that "the substantive counts [including 26 U.S.C.
28 U.S.C. § 371." Davis, 793 F.2d at 249.

1 As the U.S. Supreme Court has held, "the proper
2 standard for attorney performance is reasonably effective
3 assistance." Strickland v. Washington, 466 U.S. 668, 687
4 (1984). To establish ineffective assistance of counsel,
5 Petitioner must prove (1) "counsel's representation fell
6 below an objective standard of reasonableness," and (2)
7 there is a reasonable probability that, but for counsel's
8 errors, the result of the proceeding would have been
9 different. Id. at 688, 694. "A reasonable probability
10 is a probability sufficient to undermine confidence in
11 the outcome." Id. at 694. Under the second component,
12 Petitioner must demonstrate his attorney's errors
13 rendered the result unreliable or the proceedings
14 fundamentally unfair. Lockhart v. Fretwell, 506 U.S.
15 364, 372 (1993); Strickland, 466 U.S. at 694.

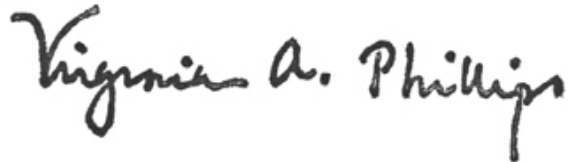
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17 A claim of ineffective assistance of counsel requires
18 proof of both of these elements. "[A] court need not
19 determine whether counsel's performance was deficient
20 before examining the prejudice suffered by the defendant
21 If it is easier to dispose of an ineffectiveness
22 claim on the ground of lack of sufficient prejudice . . .
23 that course should be followed." Strickland, 466 U.S. at
24 697.

1 Here, as explained above, Movant's sentences comport
2 with the Fifth Amendment, and do not violate the
3 Blockburger rule. As any objection to or request to
4 review Movant's sentence on this ground would have been
5 meritless, Movant's trial and appellate counsel were not
6 ineffective. See Shah v. United States, 878 F.2d 1156,
7 1162 (9th Cir. 1989) ("The failure to raise a meritless
8 legal argument does not constitute ineffective assistance
9 of counsel.") (citing Baumann v. United States, 692 F.2d
10 565, 572 (9th Cir. 1982)). Thus, as Movant cannot show
11 that his trial or appellate counsel's performance fell
12 below an objective standard of reasonableness, he cannot
13 prevail on his ineffective assistance of counsel claim.

14
15 Accordingly, Movant is not entitled to relief on this
16 ground.

17 18 IV. CONCLUSION

19 Movant has not shown he is entitled to relief on any
20 of the grounds raised in his Motion. Hence, the Court
21 DENIES the Motion and orders this action dismissed with
22 prejudice.

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25 Dated: March 6, 2014

26 VIRGINIA A. PHILLIPS
27 United States District Judge
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